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HAROLD B. WILLEY, Cl

Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

MEMORANDUM FOR RESPONDENT REGARDING BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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The *amicus* brief is no more than an unwarranted last-minute intrusion of an issue not present in the case. None of the questions presented, as stated in the record or in the briefs of the parties, concerns the issue apparently sought to be injected by the State's brief; for nowhere is any issue framed regarding the validity of Respondent's rights *vis-a-vis* the State of New York. The fundamental issue presented is the effect of the Federal Power Act—regulation or evaporation—on those rights.

It would be perilous for this Court to attempt to decide, on the present record, the questions sought to be raised by the *amicus* brief. Indeed, it is not clear precisely what that brief seeks: The State asserts that it "takes no position" in the controversy at bar; states that although it is not a party to this proceeding and would not

be bound by it, nevertheless the State desires to call the Court's attention to the questions raised in its brief; and prays for a specific adjudication of the State's claim (Br. 2, 4, 51). Is this Court to enter upon an inquiry of questions not before it simply for the purpose of gratuitously advising New York on a matter which New York itself acknowledges will in no way bind it?

This memorandum will not argue the merits of the issues raised in the State's brief. But because of the public interest assertedly surrounding the questions raised in that brief, particularly in view of the pending controversy over the development of additional power at Niagara Falls, we note our disagreement with various points raised in the State's brief. We wish to make clear that we will vigorously contest an attack by the State on these rights if it is ever properly made in an appropriate forum. At this time, however, we are unwilling to let pass *sub silentio* various erroneous statements in the State's brief.

We observe that the State's assertions have a familiar odor; most if not all have been put forward by the State Water Power and Control Commission in prior litigation regarding diversions from the Niagara River discussed in our main brief (pp. 60-63). Presumably the State is moved to resurrect these claims because of the current dispute as to who shall develop additional power at Niagara Falls; but that seems hardly a justifiable reason for injecting these time-worn claims into the present litigation.

We note at the outset that the bulk of the State's brief is in agreement with the fundamental proposition argued in our main brief—that the Federal Power Act has not destroyed proprietary rights to the use of waters from navigable streams (Br. 21-42).

But the remainder of the State's brief, arguing that the State and not Respondent has the sole proprietary interest

BLEED THROUGH-

in the waters of the Niagara River, raises a number of points with which we are in sharp disagreement:

1. We challenge the assertion that Respondent has no rights of diversion as riparian owner because the State, as a lower riparian owner, is assertedly entitled to the full flow of the stream (Br. 42-44). The fact is that the State's lower riparian rights were acquired after the common owners of the lands bordering the hydraulic canal and of the lands later included in the State Reservation had agreed to the diversions through the canal to the land below the Falls, thus bypassing the intervening lands which later became the State Reservation.[1] Can it be said that a lower riparian owner, who acquires his land with knowledge of diversions by an upstream owner—made under grant from and agreement with his own predecessors in title—may nevertheless insist upon the full flow of the stream free and clear of such diversions? We say not; *volenti non fit injuria.* Indeed, in prior litigation between Respondent and the State Water Power and Control Commission, the court stated that by the 1892 and 1896 statutes (N.Y.L. 1892, c. 513, R. 403; L. 1896, c. 968, R. 405) the State as a lower riparian owner consented to the diversion of waters by Respondent's predecessors around the State Reservation. *Water Power and Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div. 460, 463 (1941), *aff'd*, 289 N. Y. 353 (1942).

2. We challenge the statement that riparian owners in New York have no proprietary interest

[1] See *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696, 698-701 (1945) summarizing the history of diversions from the Niagara River.

or right in the use of water as appurtenant to the soil owned by them on the banks of navigable rivers (Br. 45). This broad language regarding riparian rights, quoted from an 1885 decision, is totally at variance with and must be regarded as overruled by later New York decisions cited in our main brief. *United P. B. Company* v. *Iroquois P. & P. Company*, 226 N. Y. 38, 46 (1919); *Waterford Electric Light, Heat and Power Company* v. *The State of New York*, 208 App. Div. 273, 283 (1924), *aff'd without opinion*, 239 N. Y. 629 (1925). And with respect to the very diversions at bar, it has been acknowledged that "there can be no doubt of the right of riparian owners to use this [Niagara River] water", subject of course to the "sovereign's judgment of necessity." *Niagara Falls Power Co.* v. *Dargea*, 185 Misc. at 704 (1945).

Moreover, as pointed out in our main brief (pp. 15-18) this Court and the courts of New York have expressly recognized the validity of the rights at bar. *International Paper Company* v. *United States*, 282 U. S. 399 (1931); *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company* v. *Smith*, 70 App. Div. 543 (1902), *aff'd without opinion*, 175 N. Y. 469 (1903); *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.*, 198 App. Div. 644, 646 (1921). The State now attempts to distinguish these cases on the ground that the State was not a party thereto (Br. 46, 50); but the tenuous character of this distinction becomes apparent when it is realized that in *Smith* the controversy was with the taxing authorities of the City of Niagara Falls.

BLEED THROUGH-

3. We challenge the claim that an 1885 condemnation by the State, of downstream land for the State Reservation, terminated Respondent's rights of diversion (Br. 46-47). As the State well knows, the fact is that Respondent's predecessor, the then proprietor of the canal, was not a party to the condemnation proceeding and no part of its land used for canal purposes was taken. The rights acquired by the State at that time were expressly limited to premises "within said boundary lines, including all water rights, * * * embraced and included within said boundary lines"; this much is clear from the quotation in the State's brief at pp. 46-47. Can it be seriously asserted that by condemning a specific parcel of riparian land the State has generally appropriated all waters of the Niagara River?

The 1895 opinion of the Attorney General of New York (Br. 8, 47) adds nothing, for a year later the State Legislature passed a statute which "recognized, declared and confirmed" the riparian rights of Respondent's predecessor to take and use waters of the Niagara River and to develop power therefrom (N.Y.L. 1896, c. 968, R. 405).

4. We challenge the contention that the 1896 statute, and other enactments of the New York Legislature, constitute mere permits revocable at will (Br. 47-50). But admitting solely *arguendo* that water rights granted by the State may be revocable in character, the fact remains that no such revocation has here been undertaken by the State—particularly none before or during the period from March 1941 to December 1946 with which the present controversy is concerned.

The State's principal reliance here appears to be *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), *error dismissed*, 242 U. S. 272 (1916), which is fully dealt with in our main brief at p. 58. The State also apparently seeks comfort from selected extracts of *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945). *Duryea* is fully discussed in our main brief at pp. 60-63; the fundamental and indisputable fact is that *Duryea* in no way holds that Respondent's water rights have been abolished.

5. We challenge the assertion that 1931 and 1951 State statutes (N.Y.L. 1931, c. 772, §1; L. 1951, c. 146, §1) abolished Respondent's water rights (Br. 3-4). The State makes no attempt to elaborate this claim. It is sufficient for present purposes to observe that both those statutes relate by their express terms to beds and waters and power sites "owned or controlled" by the State—not to existing privately-owned water rights and power sites.

6. We challenge the notion that the State asserted its title to Respondent's water rights by collecting a rental for the use thereof (Br. 2, 20). The history of *Duryea*, outlined in our main brief at pages 60-63, answers this contention.

In closing, we point out that Respondent has never been required to obtain a license from the State Water Power and Control Commission; that its diversions from the Niagara River have never been interfered with and have continued to date; and that relying upon its vested rights to divert waters from the Niagara, Respondent has laid out many millions of dollars in the development of hydro-electric plants using those rights. The present contro-

BLEED THROUGH-

versy involves only the period from March 1941 through December 1946; at no time during the extensive proceedings before the Federal Power Commission did the State assert the claims it seeks to raise at this eleventh hour before this Court. Indeed, it baldly asserts that it has no interest in the matter with which the Commission was then dealing. Yet with no record support whatever, it now asks this Court to take cognizance of its wholly extraneous contentions.

Respectfully submitted,

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